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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 638

CHENG FAN KWOK, PETITIONER

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (A. 19a–25a) is reported at 381 F. 2d 542.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1967 (A. 18a). The petition for a writ of certiorari was filed on September 20, 1967, and was granted on January 29, 1968.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1]Petitions for certiorari were filed in Nos. 637 and 638, this Term. The two cases involved similar questions and both were included in the decision of the court below here at issue. On December 11, 1967, this Court granted certiorari in No. 637, but took no action on No. 638. The petition in No. 638 was granted after the Court was informed that No. 637 might become moot upon the impending departure from the United States of the petitioner in that case.

QUESTION PRESENTED

Whether Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)), vesting in the courts of appeals exclusive jurisdiction to review all "final orders of deportation," applies to an administrative order refusing a stay of deportation.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth in Appendix A, *infra*, pp. 45–54.

STATEMENT

Petitioner is a 47-year-old native and citizen of China who arrived at San Pedro, California, as a crewman on a vessel on November 24, 1965. He was permitted to enter the United States while his vessel was in port, but in no event for more than 29 days.[2] However, he deserted his vessel and remained in the United States unlawfully until he was apprehended in Newark, New Jersey, early the following year (A. 14a).

In the ensuing deportation proceedings petitioner conceded deportability. On March 3, 1966, the special inquiry officer granted him the privilege of voluntary departure, specifying that if petitioner failed to depart within the allotted time he was to be deported to Hong Kong, the place he had designated and where his wife and four children resided, and alternatively to the Republic of China on Taiwan, if Hong Kong would not accept him.[3] Petitioner appealed to the

[2] See Section 252, Immigration and Nationality Act (8 U.S.C. 1282).

[3] See Section 243(a), Immigration and Nationality Act (8 U.S.C. 1253(a)).

Board of Immigration Appeals, contending that the special inquiry officer lacked power to designate the place of deportation. The Board rejected this contention and dismissed the appeal on April 5, 1966 (A. 15a).

Upon petitioner's failure to depart voluntarily, he was directed to surrender for deportation on June 20, 1966 (A. 16a). On that date he filed an application for a stay of deportation, asserting that he was entitled to a determination of his classification as a refugee pursuant to Section 203(a)(7) of the Act (8 U.S.C. (Supp. II) 1153(a)(7)), that he did not believe he could make such an application in Hong Kong, and that he would depart from the United States as soon as his classification was determined (A. 8a).[4] The district director denied his application for a stay of deportation on the ground that he was not eligible for the relief he sought (A. 6a).[5]

Although the companion *Chung* case (No. 637, this Term) may now have become moot, it was considered, along with the instant case, in the opinion below. A brief summary of the facts of that case may assist in providing a comprehensive view of the question here presented and its significance for the disposition of

[4] Petitioner in the instant case, unlike the petitioner in No. 637, lacked the two years of residence required to make application for adjustment of status in this country under Section 203(a)(7).

[5] See *Mui* v. *Esperdy*, 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017, where denials of relief to aliens in similar situations were upheld; see also *Lee* v. *Immigration & Naturalization Service*, 375 F. 2d 723 (C.A. 9), certiorari denied, 389 U.S. 856.

other pending cases.[6] In *Chung* the petitioner also entered the United States as an alien crewman, and the duration of his stay was similarly limited. He remained longer than permitted, and deportation proceedings were commenced against him. He apparently conceded his deportability but sought permission to depart voluntarily, which request was denied. Ordered to surrender for deportation to Hong Kong, Chung filed an application for a stay of deportation with the district director to allow him time to submit an application for adjustment of status pursuant to the recently amended Section 203(a)(7). The district director denied the application on the ground that adjustment of status under Section 203(a)(7) is governed by Section 245 (8 U.S.C. 1255) and that crewmen are specifically excluded from adjusting their status under the latter provision (see A. 20a).

Both petitioners filed petitions for review in the Third Circuit. The government joined petitioners in asserting that the court of appeals had jurisdiction under Section 106(a) since the stays of deportation sought from the district director would affect the execution of the final orders of deportation which had been entered against them. That court, however, concluded that review in a court of appeals under Section 106(a) lies only where the order sought to be reviewed was made by a special inquiry officer as an

[6] By stipulations and court orders in the Third Circuit, approximately 119 pending cases are governed by the disposition of the *Chung* (No. 637) and *Kwok* (No. 638) cases. Of these, 45 are controlled by *Chung*, 69 by *Kwok*, and five by both cases.

integral part of deportation proceedings subsequently appealed to the Board of Immigration Appeals (A. 23a–24a). Noting a conflict among circuits on this question, the court below placed primary reliance on its reading of this Court's decision in *Foti* v. *Immigration & Naturalization Service,* 375 U.S. 217, and stated its disbelief "that Congress by enacting § 106(a) or the Supreme Court by construing that section liberally intended that all administrative decisions affecting the deportation of an alien should be reviewable directly and exclusively in the court of appeals" (A. 23a). Accordingly, the court below dismissed the petitions for review without consideration of the merits. Adhering to the position taken in the court of appeals on the jurisdictional issue and noting the existing conflict among the circuits, the government joined petitioners in urging the Court to grant certiorari to resolve this question.

SUMMARY OF ARGUMENT

I

The legislative history of the exclusive review procedure prescribed by Section 106(a) of the Immigration and Nationality Act demonstrates the dominant congressional purpose "to abbreviate the process of judicial review of deportation orders in order to frustrate * * * dilatory tactics in the courts." (*Foti* v. *Immigration & Naturalization Service,* 375 U.S. 217, 224). This was accomplished primarily by eliminating challenges to such orders in the district courts and by requiring that attacks on administrative determinations be presented directly to the courts of appeals.

As pointed out in *Foti* (*id.* at 225), "The key feature of the congressional plan directed at this problem was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals, subject only to the certiorari jurisdiction of this Court."

II

The court below has misread this Court's decisions in *Foti* and in *Giova* v. *Rosenberg*, 379 U.S. 18, and its resulting conclusion impairs achievement of the statutory objectives. While the *Foti* opinion focused on determinations made by a special inquiry officer in a proceeding before him, that was because the Court was there dealing with a contention that some of the elements of his decision were reviewable separately in district courts. *Foti* expressly reserved the question of the reviewability under Section 106(a) of orders refusing to reopen deportation proceedings (375 U.S. at 231), and that question was resolved in favor of court of appeals' review in *Giova*.

The supposition that Section 106(a) relates only to proceedings conducted by special inquiry officers is unsupported by the statute and contrary to its purpose of expediting judicial review. It ignores the Attorney General's ultimate responsibility for administration of the immigration laws and for the delegation of his authority to various officials. It also obscures the crucial consideration—the relationship of the administrative determination to the basic order.

Congress cited as prime examples of abuse instances where repeated judicial review of administrative denials of relief had been sought after entry of the basic order. The court of appeals would not deny judicial review in such cases but would channel it initially to district courts. The result would be that separate portions of a deportation proceeding would be reviewed in different courts. Moreover, in attempting to distinguish between motions to reopen and motions for stays of deportation, the court has produced an anomalous situation—the form in which relief is sought, instead of the substance, determines the applicability of Section 106(a).

III

While Section 106(a) is not free from ambiguity, the statutory text admits of the interpretation we urge. The phrase "final orders of deportation" has already been construed broadly by this Court in *Foti* and *Giova*. The statutory designation of orders made "pursuant to administrative proceedings under section 242(b)" apparently stemmed from the desire to make clear that Section 106(a) had no application to *exclusion* proceedings. Moreover, determinations relating to the execution of the deportation order, including rulings on motions to stay deportation, can be regarded as having been made "pursuant" to proceedings under Section 242(b). Indeed, a deportation order might well be regarded as lacking elements of finality when its execution might be directly affected by subsequent applications for relief which are pending adminis-

tratively. This approach is explicitly confirmed by the most direct evidence of congressional purpose, the House Judiciary Committee's reference chart of "Deportation Case Procedures" which specifically lists "Stay of Deportation" and "Deportation" (*i.e.*, measures to execute the order) as segments of the deportation proceeding.

IV

Those courts of appeals which have adopted a restrictive interpretation of Section 106(a) have mistakenly placed principal reliance on the premise that such a view is required by the language of the statute and by this Court's decisions in *Foti* and *Giova*. The suggestion of the court below that new legislation is needed to avoid "fruitless jurisdictional disputes" is beside the mark since no such legislation will be required if the statute is construed in the manner we urge. Underlying the Second Circuit's view is a belief that the acceptance of jurisdiction would overburden the courts of appeals. The same fear was voiced by that court in *Foti*, but was found unpersuasive by this Court (375 U.S. at 230). No excessive burden of review developed in the Second Circuit after *Foti;* nor has such ensued in the Seventh Circuit and the other courts of appeals which construe the scope of Section 106(a) broadly. Similarly, the Ninth Circuit's suggestion that the statutory objective could be accomplished by revision of the administrative regulations so that special inquiry officers would make all reviewable determinations in a single proceeding ignores the

practical considerations which preclude such an approach. Thus, the inevitable result of a restrictive interpretation of the statute is to channel litigation challenging determinations made subsequent to the basic deportation order into the district courts, contrary to the aim of Section 106(a).

ARGUMENT

Section 106(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a) was enacted in 1961 and prescribes an exclusive procedure for judicial review of final deportation orders in courts of appeals. Questions involving the scope of that section have been considered by this Court on two prior occasions. In *Foti* v. *Immigration & Naturalization Service,* 375 U.S. 217, this Court unanimously adopted a broad reading of Section 106(a), and found that its language, considered in light of the basic congressional purpose, embraced discretionary determinations made during deportation proceedings. *Giova* v. *Rosenberg,* 379 U.S. 18, decided the following year by a unanimous court in a brief *per curiam* opinion, extended the liberal reading of the statute to include denials of motions to reopen deportation proceedings, an issue reserved in *Foti.*

Here, the question is whether the exclusive statutory procedure for judicial review also includes review in courts of appeals of denials of motions to stay deportation. On this issue, and on similar issues dealing with review of other ancillary and discretionary determinations which relate to or affect deportation orders, the lower courts are divided. This divergence

has resulted in "fruitless jurisdictional disputes" (*Mui* v. *Esperdy*, 371 F. 2d 772, 778 (C.A. 2), certiorari denied, 386 U.S. 1017) which have impaired effective administration of the laws relating to deportation. We urge a generous reading of the statute and believe that the restrictive interpretation adopted by the court below would defeat the congressional objective of minimizing dilatory and obstructive litigation which impedes the execution of deportation orders.

I. THE EXPLICIT CONGRESSIONAL PURPOSE IN ENACTING SECTION 106(a) WAS TO EXPEDITE THE EXECUTION OF DEPORTATION ORDERS BY PROVIDING FOR EXCLUSIVE REVIEW IN A COURT OF APPEALS

Concededly, the decisive language of Section 106(a) is somewhat unclear. Taking cognizance of the ambiguity, this Court observed in *Foti* (375 U.S. at 224):

> In arriving at the intended construction of this language, we must therefore inevitably turn to the purpose of Congress in enacting this legislation. The fundamental purpose behind § 106(a) was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.

Since the legislative history of Section 106(a) was extensively discussed in *Foti* (see 375 U.S. at 223–226), we limit ourselves here to a brief review of some of the salient aspects of that background. Proposals for the enactment of a statute providing for fair yet expeditious review of deportation orders originated

as early as 1952. See *Whom Shall We Welcome?*, Report of the President's Commission on Immigration and Naturalization, p. 169 (1953). In the ensuing years President Eisenhower twice recommended enactment of such a measure, and his recommendations were repeatedly supported by the Department of Justice (see H. Rep. No. 565, 87th Cong., 1st Sess., pp. 2–7). Earlier drafts provided for review in the district courts, with safeguards against repetitive and dilatory litigation (see H.R. 9182 and S. 3169, 84th Cong., 2d Sess.). However, the measure assumed its final form in bills introduced by Representative Walter in 1958 which prescribed the formula of exclusive review in the courts of appeals that was ultimately adopted. After conducting hearings the House Judiciary Committee reported a bill favorably, and it was passed by the House of Representatives in three succeeding Congresses, during the last of which the Senate joined with the House, and the bill, now in omnibus form, became law on September 26, 1961, as P.L. 87–301, 75 Stat. 650.

Thus, the measure was under continuous consideration in Congress for a period of nine years before its enactment. At every stage of this consideration the sponsors emphasized their desire "to abbreviate the process of judicial review of deportation orders in order to frustrate * * * dilatory tactics in the courts" (*Foti*, 375 U.S. at 224).

In the first exposition of his bill in the House Hearings, Representative Walter stated that the purpose of the legislation was to end "protracted litigation" challenging deportation orders and to set up "a single,

expeditious, and fair method of review" for that purpose.[7] The House Judiciary Committee, in its report on the 1961 omnibus bill which eventually became law, likewise noted its concern with "flagrant abuse of judicial review" by "protracted litigations," examples of which had been described in earlier committee reports, and stated that the objective of the judicial review provision was "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States" (H. Rep. No. 1086, 87th Cong., 1st Sess., pp. 22, 23). Similar expressions, in virtually identical language, appear in each earlier report of the House Judiciary Committee (H. Rep. No. 2478, 85th Cong., 2d Sess., p. 2; H. Rep. No. 423, 86th Cong., 1st Sess., p. 1; H. Rep. No. 565, 87th Cong., 1st Sess., p. 1).[8]

More specifically, the colloquy during the 1959 House debates between Representatives Walter, Lindsay and Moore (105 Cong. Rec. 12728), relied upon by the Court in *Foti* (375 U.S. at 223–224), is highly significant. This discussion, involving three legislators knowledgable in immigration matters, portrays a clear

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[7] *Judicial Review of Deportation and Exclusion Orders*, Hearing before Subcommittee No. 1 of the House Judiciary Committee on H.R. 13311, 85th Cong., 2d Sess., p. 22.

[8] To like effect, see 104 Cong. Rec. 17172–17173, for the remarks of Representative Walter, author of the bill and spokesman of the House Judiciary Committee, when the legislation was first considered in 1958; 105 Cong. Rec. 12728, where Congressman Walter agreed with Congressman Lindsay "that if there is any remedy on the administrative level left of any nature, * * * the deportation order will not be considered final" (*ibid.*).

intent that determinations directly affecting deportation orders, although made after the primary deportation proceeding, would be subject to the exclusive review procedure prescribed by Section 106(a). As Representative Walter stated, the term "final order of deportation," as used in the statute, "means the final administrative order" (105 Cong. Rec. 12728).

What emerges with clarity from a survey of the legislative history is the constantly articulated design of Congress to provide a single method or form of judicial review in courts of appeals. As described by Representative Walter (104 Cong. Rec. 17173), the review procedure prescribed, "by eliminating review in the district courts, * * * would obviate one of the primary causes of delay in the final determination of *all questions which may arise in a deportation proceeding*" (emphasis added). This crucial aspect of the legislation was aptly described by this Court in *Foti* (375 U.S. at 225):

> The key feature of the congressional plan directed at this problem was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals, subject only to the certiorari jurisdiction of this Court.

II. ACCEPTANCE OF THE VIEW ADOPTED BY THE COURT OF APPEALS WOULD IMPAIR THE CONGRESSIONAL PURPOSE IN ENACTING SECTION 106(a).

Despite the legislative history which shows that Congress's design in enacting Section 106(a) was to end the bifurcation of judicial review of deportation

matters, the court of appeals here concluded that the reach of that provision did not extend to review of administrative denials of stays of deportation. In so ruling, the court below, relying extensively on a footnote in this Court's *Foti* opinion (375 U.S. at 230, n. 16; see A. 24a), found that *Foti* restricted Section 106(a) review to determinations initially made by special inquiry officers. This Court's later holding in *Giova* v. *Rosenberg,* 379 U.S. 18, that orders denying motions to reopen are reviewable in courts of appeals, was distinguished by the court below on the ground that such motions are addressed to the special inquiry officer and are part of the deportation proceedings (A. 24a–25a). In our view, the court of appeals' analysis of *Foti* and *Giova* is erroneous, and its reliance on these decisions is misplaced.

It is true that the *Foti* opinion emphasized the function of the special inquiry officer to decide all questions in the proceeding before him. But that was so, we submit, only because the Court in *Foti* was dealing with a contention that some of the elements of the special inquiry officer's decision were not within the ambit of Section 106(a). It is also true that in footnote 16 the Court said that under earlier procedure applications for withholding of deportation under Section 243(h) of the Act (8 U.S.C. 1253(h)) were dealt with separately and "presumably" were not covered by Section 106(a). But the Court was not actually confronted with the reviewability of such an application in *Foti,* and we do not regard that tentative footnote observation as intended to foreclose the

issue. Indeed, in *Foti* this Court reserved the question of the reviewability under Section 106(a) of orders refusing to reopen deportation proceedings, stating: "The question is admittedly a somewhat different one, since such an administrative determination *is not made during the same proceeding* where deportability is determined and discretionary relief is denied" (375 U.S. at 231) (emphasis added). That question was resolved in the subsequent *per curiam* decision in *Giova,* which clearly indicates, in our view, that Secton 106(a) is applicable to at least some determinations made subsequent to the entry of the primary order and not considered in the basic deportation proceedings.

By the same token, we dispute the court of appeals' suggestion that Section 106(a) has been definitively construed as applying only to decisions initially made by special inquiry officers. In *Foti* the emphasis on the role of the special inquiry officer was addressed to an attempt to bifurcate the review of portions of his decision. Likewise, in *Giova* the focus on the fact that decisions denying motions to reopen are made in proceedings initiated before special inquiry officers—either by such officers or by the Board of Immigration Appeals (see 8 C.F.R. 3.8, 103.5, 242.22)—finds its explanation in the limited issue then before the Court. Nothing in the Court's decisions in those cases was, in our view, intended to predetermine other and different questions regarding the scope of Section 106(a) that might arise in the future. Nor can the position taken by the government in *Foti* and *Giova* properly be viewed as having irrevocably conceded the inapplicability of

the review statute to situations such as are involved here.[9]

Nothing in the language of Section 106(a) requires that its coverage be confined to determinations made by special inquiry officers. Such a narrow view would not only be artificially literal but would ignore the statute's "fundamental purpose * * * to abbreviate the process of judicial review of deportation orders" (*Foti*, 375 U.S. at 224). No specific reference is made to special inquiry officers in Section 106(a). All authority under the immigration laws is vested in the Attorney General, who is authorized to delegate such authority (Section 103(a), Immigration and Nationality Act, 8 U.S.C. 1103(a)). The Attorney General has delegated his functions to various officers, and such allocations of responsibility have frequently been changed. 1 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed.), Sec. 1.7.

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[9] We recognize that the position here taken goes beyond that espoused in the government's brief in *Foti* (see Govt. Br., No. 28, 1963 Term, pp. 47–49) and, to a lesser extent, in *Giova* (see Govt. Br., No. 23, 1964 Term, pp. 16–17). Developments in the ensuing years, particularly the split in the circuits on the question of the applicability of the statute to review of ancillary determinations which directly affect execution of deportation orders, and the resulting jurisdictional disputes and bifurcation of review in some circuits, have led us to reconsider the position previously taken in this Court. We are confirmed in this course by the Court's liberal reading of the statute in *Foti* and its summary disposition of the issue involved in *Giova*, one which is closely related to the question here presented and which was preserved for later decision by the Court in *Foti*. We are now convinced, despite our earlier misgivings, that the language of the statute does admit of the reading we urge and that the congressional purpose cannot be achieved, as experience has shown, by a restrictive interpretation.

Section 106(a) does of course explicitly refer to "final orders of deportation * * * made * * * pursuant to administrative proceedings under section 242(b)" of the Act. And Section 242(b) of the Act (8 U.S.C. 1252(b)) recognizes the special inquiry officer's role in conducting deportation proceedings and in making determinations "as authorized by the Attorney General." But that section does not derogate from the Attorney General's control over, and his responsibility for, the entire deportation process. Thus, the Attorney General designates special inquiry officers and defines their duties (Section 101(b)(4), Immigration and Nationality Act, 8 U.S.C. 1101(b)(4)). He has assigned to district directors various other duties in the deportation process, and has established a Board of Immigration Appeals to hear appeals from certain decisions of special inquiry officers and of district directors. In addition, the Attorney General has provided for his own review, in some instances, of decisions of the Board of Immigration Appeals (see 8 C.F.R. 3.1, 103.1).

Moreover, the supposition that Section 106(a) deals only with administrative proceedings in which a special inquiry officer participates would make the application of the statute dependent on form rather than substance, and would countenance the type of bifurcated judicial review characterized by this Court in *Foti* as "inconvenient" and "clearly undesirable" (375 U.S. at 232). That view would foster the type of obstructive litigation that Section 106(a) was designed to eliminate. What the court below overlooked is that Congress, in enacting Section 106(a),

was vitally concerned with efforts to block deportation through dilatory tactics in seeking judicial review of applications made *after* the basic deportation order had been entered. As noted by this Court in *Foti* (375 U.S. at 226), the case histories of abuse recited in the various committee reports often included instances of litigation arising out of discretionary determinations. And among the most glaring examples of abuse were cases involving repetitious judicial review of discretionary relief sought after the basic order (see H. Rep. No. 565, 87th Cong., 1st Sess., pp. 7–11, 20–23).

Obviously, the ruling of the court of appeals does not purport to foreclose any judicial review of such subsequent determinations. It holds merely that the procedure for exclusive review in courts of appeals prescribed by Section 106(a) is inapplicable here. The converse, of course, is that such subsequent determinations can be challenged in district courts, in a suit brought under the Declaratory Judgment and Administrative Procedure Acts. *E.g., Mui* v. *Esperdy*, 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017. Were this the approach required, we would then be back to a situation almost as confusing and overlapping as that which gave rise to Section 106(a). One set of determinations affecting deportation orders would be reviewable in the courts of appeals; another set of determinations would be reviewable in the district courts. Both types of review could proceed consecutively or simultaneously. Appeals could of course be taken from district courts to courts of appeals, and would probably be taken in those cases where the principal objective was forestalling execution of de-

portation orders. Thus, many cases would reach courts of appeals in any event, whether pursuant to Section 106(a) or otherwise.

Here the merits of the controversy were briefed and argued in the court of appeals. All that will be accomplished by its refusal to exercise jurisdiction is to promote further delay in disposing of the cases of the 119 deserting Chinese crewmen here involved (see note 6, *supra*). If the Third Circuit's decision is upheld, these cases will have to be heard by a district court, and then most or perhaps all of them will be back before the court of appeals on appeal from the district court's decision. This was the time-consuming route followed by 384 deserting Chinese crewmen whose cases were governed by *Mui* v. *Esperdy, supra.* Moreover, the additional district court consideration required under the court of appeals' decision is pointless in the light of the manifest lack of merit here. The contention that the benefits of Section 203(a)(7) of the Act (8 U.S.C. (Supp. II) 1153(a)(7)), can be sought by recently deserting Chinese crewmen in the United States has already been considered and rejected by the Second Circuit in *Mui* v. *Esperdy, supra,* and by the Ninth Circuit in *Lee* v. *Immigration & Naturalization Service,* 375 F. 2d 723 (C.A. 9), certiorari denied, 389 U.S. 856.[10]

[10] Faced with such an insubstantial suit, the court below could well have followed the example of the Second Circuit in *Cheung* v. *Esperdy,* 377 F. 2d 819. In a similar situation involving review of denials of applications for stays of deportation, the court commented on the obviously dilatory na-

Accordingly, the approach adopted below would undermine the principal objectives sought to be attained by the enactment of Section 106(a). *First,* by requiring initial district court review of certain discretionary, administrative determinations affecting deportation orders, it would depart from the "key feature of the congressional plan" which was "the elimination of the previous initial step in obtaining judicial review—a suit in a District Court * * *" (*Foti,* 375 U.S. at 225). *Second,* it would invite the type of fragmented, piecemeal litigation this Court has characterized as "not only inconvenient [but] * * * clearly undesirable and not the necessary result from a fair interpretation of the pertinent statutory language" (*id.* at 232). *Third,* since a declaratory judgment suit against the Attorney General could be brought in the District of Columbia, it would again encourage concentration in that district court of litigation challenging deportation orders, notwithstanding Congress's effort to avoid that result by the venue provisions in Section 106(a)(2) of the Act (8 U.S.C.

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ture of the litigation, and while doubting its jurisdiction, ruled against petitioners on the merits. In addition, reference should be made to the oddly different course of procedure followed in the *Lee* case. The ultimate relief sought in *Lee* was identical with that sought in the instant case. Yet Lee's counsel requested relief through a motion to reopen, which was found, in light of *Giova*, to confer jurisdiction on the court of appeals and to warrant expedited consideration. Counsel in the instant case designated his application as one for a stay of deportation, and this was found to result in an absence of jurisdiction in the court of appeals to review directly and to require the added step of initial district court consideration. Such an irrational distinction merely encourages forum-shopping for dilatory purposes.

1105a(a)(2)) (see H. Rep. No. 565, 87th Cong., 1st Sess., pp. 3, 13–16; H. Rep. No. 1086, 87th Cong., 1st Sess., pp. 28–29).[11] *Finally,* by precluding petitions for review under Section 106(a) relating to ancillary orders such as those denying a stay of deportation, it would in numerous instances make unavailing the explicit safeguards against repetitious litigation provided for in Section 106(c) of the Act (8 U.S.C. 1105a(c)) (see the discussion *infra,* p. 40). Those safeguards relate only to petitions for review or for habeas corpus, and apparently could not be invoked to defeat declaratory judgment suits challenging such determinations (see App. A, *infra,* pp. 48–49).

In short, we submit that the lower court's construction would lead to bifurcated, repetitious and dilatory litigation and would substantially impair the efficacy of the statute in meeting the problems it was designed to remedy. Indeed, the developing litigation has already shown this consequence in operation.

III. THE CONSTRUCTION HERE URGED IS CONSISTENT WITH THE LANGUAGE OF THE STATUTE AND WOULD FULFILL ITS PURPOSE

While the language of Section 106(a) is regrettably unclear, it is plain that the statute should be read, so far as its text permits, in a way which would effectuate its goal of minimizing dilatory, obstructive and repetitious attacks on deportation orders. That objective can best be achieved by requiring that judicial review of all administrative determinations

[11] See, *e.g.*, *De Lucia* v. *Attorney General*, No. 21,030 (C.A. D.C.), discussed in note 15, *infra.*

which are ancillary to and directly affect a basic deportation order—by seeking to vacate, suspend or delay the execution of such an order—be conducted exclusively in courts of appeals. Such a construction, we submit, is amply supported by the statutory language when considered, as this Court did in *Foti* (see 375 U.S. at 224), against the background of the congressional purpose.

The chief impediment found by some courts of appeals in arriving at such a construction is the statutory reference to "final orders of deportations" entered "pursuant to administrative proceedings under section 242(b) of this Act * * *." In *Foti* this Court rejected a restrictive interpretation of the first of the quoted phrases—one which would have limited the review procedure prescribed strictly to determinations of deportability. No consideration was given to the effect of the second phrase, except to note the relationship between the two (see 375 U.S. at 228), but that phrase has generally been cited by the courts favoring a restrictive interpretation of the scope of Section 106(a).

No definitive explanation of the intended meaning of the phrase appears in the legislative history. Early versions of the judicial review bill merely referred to "orders of deportation" (*e.g.*, H.R. 9182 and S. 3169, 84th Cong., 2d Sess.) The quoted language was added by Representative Walter, together with the reference to "final" orders, in his 1958 bill (H.R. 12487, 85th Cong., 2d Sess.). As previously noted (*supra*, p. 11), this measure set the pattern from which Sec-

tion 106(a) ultimately emerged, without substantial change.

It seems clear that in proposing this new language Representative Walter did not envisage its having any limiting impact. On the contrary, as the leading spokesman on behalf of the judicial review bill, he vigorously and repeatedly denounced repetitious and dilatory tactics obstructing the execution of deportation orders and urged a comprehensive statute to cope with these abuses. In the absence of a particularized explanation, we suggest that the reason the language in question was added was to make certain that the proposed review procedure would not be applicable to *exclusion* proceedings barring aliens seeking entry into the United States, as distinguished from *deportation* proceedings relating to aliens already in the country.[12] Representative Walter frequently emphasized his desire to limit review in exclusion cases to habeas corpus. His bill, and the law as finally enacted, included explicit provisions to assure this result (Section 106(b) of the Act, 8 U.S.C. 1105a(b)). In adding the quoted language regarding proceedings under Section 242(b), we suggest, Representative Walter's aim was to avert any possible interpretation which would make

[12] Interestingly, the Act uses the identical term "deported" in regard to the exclusion of aliens seeking entry and the expulsion of aliens already in the United States (compare Sections 236 and 237 (8 U.S.C. 1226, 1227) with Sections 241 and 242 (8 U.S.C. 1251, 1252). For the distinction between exclusion and deportation proceedings, see *Ma* v. *Barber*, 357 U.S. 185, and *Chew* v. *Colding*, 344 U.S. 590; see also *Chin* v. *Immigration & Naturalization Service*, No. 1160, this Term, where it is contended, erroneously in our view, that Section 106(a) review is available to an alien subject to an exclusion order.

the new review procedure available to aliens seeking admittance to the United States.

Moreover, the statute speaks of orders made "pursuant" to proceedings under Section 242(b). This itself invites a more liberal construction than that adopted by court of appeals, since orders made "pursuant" to proceedings under Section 242(b), considered broadly, would include orders relating to the execution of the basic deportation order. This reading is in keeping with the Court's decision in *Giova,* where exclusive Section 106(a) review of the denial of a motion to reopen the proceedings, made after the basic deportation order, was upheld. Since the later determination related to the effective execution of the basic order, it was encompassed within the umbrella of the term "final order of deportation". No tenable basis appears to exist for differentiating the denial of a motion to stay deportation, which is often a concomitant of a motion to reopen proceedings. The contention that the two should be treated differently because under present procedures they are decided by different administrative officials misses the point that both determinations relate equally to and can similarly affect the execution of the deportation order. As we have explained (*supra,* pp. 16–17), specific reliance on the special inquiry officer's role, in view of the Attorney General's ultimate responsibility for the entire deportation process and the constantly changing assignments of administrative duties, is misplaced in

delineating the scope of Section 106(a).[13] Instead, we submit, the critical consideration is the relationship of the adminstrative determination of which review is sought to the basic deportation order, rather than the identity of the official who acted on the application.

What has led some courts of appeals, including the court below, into error is their focus on one segment of the deportation process and their consequent failure to view the process in its entirety. We turn, then, to an analysis of the various stages of the deportation process from initiation of the proceedings to execution of the expulsion order. That analysis, we submit, contradicts the hypothesis adopted by the court below.

The process leading to deportation can conveniently be divided into three parts. Involved first are determinations leading to the institution of proceedings, which might be termed "antecedent determinations." These would include, for example, denial of an application for an extension of temporary stay (see 8 C.F.R. 214.1) or rescission of an adjustment of status previously granted (see 8 C.F.R. Part 246). Although the question is not presented here, such antecedent determinations might be viewed as merging with, and thus reviewable in courts of appeals as part of, the final deportation order (compare *Yamada* v. *Immigra-*

[13] Amended regulations, effective March 15, 1968, give special inquiry officers authority to rule on applications for stays of deportation in connection with motions to reopen (8 C.F.R. 242.22, as amended by 33 Fed. Reg. 2380). The amended regulation would have no impact in the instant case, where the motion for a stay was not accompanied by a motion to reopen the proceedings.

tion & Naturalization Service, 384 F.2d 214, 218 (C.A. 9); *Waziri* v. *Immigration & Naturalization Service,* C.A. 9, No. 21,129, decided January 18, 1968). Alternatively, when review of the basic deportation order is sought, such antecedent determinations might also be reviewable under the doctrine of "pendent jurisdiction", a matter which this Court found it unnecessary to reach in *Foti* (375 U.S. at 227, n. 14).

The second stage of the deportation process is the commencement of the deportation proceeding and its conduct through hearing and decision by the special inquiry officer and the Board of Immigration Appeals. Some, but not all, antecedent applications can be renewed during this stage (see 8 C.F.R. 242.17, 245.2(a), 249.2). It was settled in *Foti* that the review of all determinations made during this stage, which might be referred to as "integral determinations," are definitely within the ambit of Section 106(a)'s exclusive review procedure.

The third stage of the deportation process occurs after entry of the basic deportation order, and might be characterized as involving "subsequent determinations." These would include applications bearing directly on the deportation order or its execution, such as motions to reopen the proceedings or for a stay of deportation. The third stage might also include the resolution of other applications which would operate on the deportation order less directly, but might vitiate or mitigate its effect.

Considered against this background, the effort of the court below to distinguish this Court's holding in *Giova* cannot be supported. Motions to reopen the

proceedings and for stay of deportation pertain equally to the execution of the deportation order. As subsequent determinations which bear directly on the effectiveness of the deportation order, both seem clearly within the compass of the "final orders of deportation" of which Section 106(a) speaks. Indeed, the intent of Congress to include motions for stay of deportation within the coverage of Section 106(a) is unmistakably portrayed in a House chart (reproduced as Appendix B, *infra,* p. 55) entitled "Deportation Case Procedures."[14] In that chart, "Stay of Deportation" is specifically listed as part of the deportation process, as an adjunct of "Final Order of Deportation." In addition, the chart designates the execution of the deportation order, in a box captioned "Deportation," as the final step in the deportation process. In arriving at its decision, the court below apparently was not aware of this decisive expression of congressional purpose.

We submit, therefore, that this case is controlled by the holding in *Giova,* and reversal of the judgment below would seem warranted solely on the authority of that case. We urge, however, that the Court cast its decision here in broader terms, and thus resolve definitively those questions relating to the reach of Section 106(a) which have been raised since its decisions in *Foti* and *Giova.* Much of the difficulty has resulted from efforts to separate the determination of

[14] This chart was contained in several House Judiciary Committee reports supporting Representative Walter's bill (H. Rep. No. 423, 86th Cong., 1st Sess., p. 20; H. Rep. No. 565, 87th Cong., 1st Sess., p. 27), and was referred to and relied upon by this Court in *Foti* (see 375 U.S. at 226).

deportability from the execution of the deportation order. Acceptance of this dichotomy would irrationally require expedited review of the basic order while permitting dilatory review, initiated in a district court, of questions relating to its execution.[15] Consideration of the entire deportation process leads to the conclusion, we submit, that there is no sound justification for such different and divisive treatment.

In the last analysis, Section 106(a) cannot reasonably be read as excluding review of ancillary determinations relating to and directly affecting the execution of the basic deportation order. Such determinations are not infrequently the subject of litigation. *E.g.*, *Mensevich* v. *Tod*, 264 U.S. 134; *Fang* v. *Kennedy*, 317 F. 2d 180 (C.A.D.C.), certiorari denied, 375 U.S. 833; *United States* v. *Murff*, 264 F. 2d 926 (C.A. 2). Section 242(b) of the Act (8 U.S.C. 1252(b)) provides for the

[15] An example of this irrationality is *De Lucia* v. *Attorney General*, now pending in the United States Court of Appeals for the District of Columbia (No. 21,030, C.A.D.C.). After a deportation order was entered against him, DeLucia was unsuccessful in a judicial review proceeding challenging it. *De Lucia* v. *Flagg*, 297 F. 2d 58 (C.A. 7), certiorari denied, 369 U.S. 837. Thereafter, the administrative proceedings were reopened to permit him to apply for discretionary relief. His applications were denied and he then brought another review proceeding under Section 106(a) in the Seventh Circuit. Again he was unsuccessful. *De Lucia* v. *Immigration and Naturalization Service*, 370 F. 2d 305 (C.A. 7), certiorari denied, 386 U.S. 912. Immediately after this Court's denial of certiorari, he brought a proceeding for review in the United States District Court for the District of Columbia, challenging alleged irregularities in the execution of the deportation order. The district court dismissed without opinion, on jurisdictional grounds, and an appeal from that order is awaiting decision by the court of appeals.

procedure to be followed in determining deportability. Sections 243 (a) and (h) (8 U.S.C. 1253 (a) and (h)) prescribe the procedure to be utilized in accomplishing the "deportation of an alien in the United States provided for in this Act." Section 242(b) is just such a provision. Thus, in dealing with the execution of deportation orders, Sections 243 (a) and (h) and the implementing regulations (8 C.F.R. Part 243) should be viewed, we submit, as in *pari materia* with Section 242(b) and its implementing regulations (8 C.F.R. Part 242). Accordingly, determinations relating to the execution of deportation orders under Section 243(a) and its regulations should be regarded as having been made "pursuant" to proceedings under Section 242 (b), and are thus within the literal language and the obvious contemplation of Section 106(a). Moreover, Section 106(a) expressly provides for judicial review of "final" deportation orders. Ancillary proceedings involving what we have termed subsequent determinations frequently seek relief which, if granted, would render the basic order ineffective and, in any event, invariably delay the execution of such an order. In a real sense, then, a deportation order is not an absolutely final one so long as applications for such relief are pending administratively.

Acceptance of our suggested view that Section 106(a) embraces determinations directly relating to the execution of a deportation order would resolve most of the difficulties that have arisen over the past few years in applying the statute. There would remain two unresolved areas—judicial review of antecedent determinations and of subsequent determinations not

directly concerned with the execution of the deportation order but bearing on its continuing effectiveness. Neither of these situations is immediately presented here and the Court could dispose of this case without considering them. Since, however, the instant case provides an opportunity for detailed consideration and definitive resolution of the scope of Section 106(a), we submit, in summary fashion, our views regarding these aspects of the problem.

No difficulty appears to exist in finding antecedent determinations reviewable along with deportation orders under Section 106(a), whether articulated in terms of pendent jurisdiction, the concept of merger into the final order, or the theory that the validity of the deportation order necessarily depends on the propriety of these determinations (see *supra*, pp. 25–26). Such a conclusion would have the virtue of assembling all outstanding issues in a single judicial proceeding, and would thus avoid fragmented review.

Although the practical situation is somewhat different, we similarly support jurisdiction under Section 106(a) in regard to subsequent determinations which do not deal directly with a deportation order, but which would eventually result in its mitigation or extinction. Examples of such subsequent determinations are the denial of visa petitions seeking preferred status (see *Skiftos* v. *Immigration & Naturalization Service*, 332 F. 2d 203 (C.A. 7), and of applications for waiver of the foreign residence requirements for aliens who were admitted as exchange visitors (see *Talavera* v. *Pederson*, 334 F. 2d 52 (C.A. 6)). If the relief sought is granted, such subsequent determina-

tions would lead to the granting of permanent residence status and withdrawal of the deportation order. It is unavailing, in our view, to assert that subsequent determinations are not reviewable in courts of appeals because the basic determination is not contested. As this Court noted in *Foti*, deportability is seldom contested in the administrative proceedings (375 U.S. at 227). Indeed, deportability was conceded in both *Foti* and *Giova* and the sole issue before the reviewing courts was the availability of discretionary relief which would nullify the deportation order. We see no substantial difference when the application for discretionary relief is made after, rather than during, the basic proceedings. The critical consideration, in our view, is the application's relationship to the deportation order.

Accordingly, we submit that all subsequent determinations should be considered as ancillary to and part of a final deportation order for the purposes of judicial review under Section 106(a).[16] In any event, the denial of stays of deportation—the relief sought here—plainly relates directly to the execution of the deportation order and thus, whether or not Section 106(a) is construed as reaching *all* subsequent determinations, clearly comes within the reach of the statute.

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[16] Of course, the applicability of Section 106(a) to such ancillary determinations depends on the existence of a final order of deportation. When there has been no deportation proceeding or order, review under Section 106(a) would necessarily be inappropriate. *Martin* v. *Gardner*, 378 F. 2d 352 (C.A. 7); *Mendez* v. *Major*, 340 F. 2d 128 (C.A. 8); see note 12, *supra*.

IV. THE REASONS FOR REJECTING JURISDICTION ADVANCED BY THE COURT BELOW AND BY OTHER COURTS OF APPEALS ARE UNPERSUASIVE

There is a widespread conflict among the courts of appeals regarding the proper interpretation of Section 106(a) in the light of this Court's decisions in the *Foti* and *Giova* cases. Favoring the broad construction we have suggested are the Seventh,[17] Sixth [18] and Fourth [19] Circuits. The contrary and narrow reading is supported by the court below and the Second [20] and Ninth [21] Circuits, with the Fifth Circuit apparently tending in the same direction.[22] The expressions of view by the Eighth [23] and District of Columbia [24] Circuits are thus far inconclusive. It will be useful,

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[17] *Skiftos* v. *Immigration & Naturalization Service*, 332 F. 2d 203 (C.A. 7); *Melone* v. *Immigration & Naturalization Service*, 355 F. 2d 533 (C.A. 7); see also *Blagaic* v. *Flagg*, 304 F. 2d 623 (C.A. 7); *Roumeliotis* v. *Immigration & Naturalization Service*, 304 F. 2d 453 (C.A. 7), certiorari denied, 371 U.S. 921.

[18] *Talavera* v. *Pederson*, 334 F. 2d 52 (C.A. 6); *Ferrante* v. *Immigration & Naturalization Service*, C.A. 6, Nos. 16,658, 17,854, decided February 7, 1968.

[19] *Rose* v. *Woolwine*, 344 F. 2d 993 (C.A. 4), where the court of appeals read Section 106(a) broadly to include review of administrative determinations which involve "the special consequences that will follow from the deportation" (*id.* at 995).

[20] *Mui* v. *Esperdy*, 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017; cf. *Cheung* v. *Esperdy*, 377 F. 2d 819 (C.A. 2).

[21] *Yamada* v. *Immigration & Naturalization Service*, 384 F. 2d 214 (C.A. 9); cf. *Waziri* v. *Immigration & Naturalization Service*, C.A. 9, No. 21,129, decided January 18, 1968.

[22] See *Samala* v. *Immigration & Naturalization Service*, 336 F. 2d 7 (C.A. 5), where, in a case decided prior to this Court's decision in *Giova*, the court found review under Section 106 precluded for failure to exhaust administrative remedies, and suggested that Section 106(a) review was unavailable for antecedent determinations but not for subsequent determinations.

we believe, to examine and respond to the reasons advanced by the courts which favor a restrictive interpretation.

A. *The Court Below.* Rejection of jurisdiction under Section 106(a) to review the denial of motions to stay deportation was predicated by the Third Circuit on its reading of this Court's decisions in *Foti* and *Giova*. Relying primarily on the "presumably" language in the *Foti* opinion (see *supra*, p. 14), the court below concluded that "the sole determinants of review are whether the administrative decision was made by the special inquiry officer and was an integral part of the deportation proceedings conducted by him" (A. 24a). It distinguished *Giova* on the ground that "motions to reopen are addressed to the special inquiry officer * * * and are part of the deportation proceedings" (A. 24a–25a). The latter assertion, it should be noted, is unsupported and indeed is contrary to this Court's statement in *Foti* that the issue of review of denials of motions to reopen "is admittedly a somewhat different one, since such an administrative determination is not made during the same proceeding where deportability is determined * * *" (375 U.S. at 231).

While conceding that the purpose of Section 106(a) was "to prevent dilatory tactics," the court below

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[23] Cf. *Mendez* v. *Major*, 340 F. 2d 128 (C.A. 8), where, however, there was no deportation proceeding or order.

[24] In *Attorney General* v. *Bufalino*, 371 F. 2d 738 (C.A. D.C.), Section 106(a) was found controlling where the review concerned an integral aspect of a reopened deportation proceeding; see also *De Lucia* v. *Attorney General*, No. 21,030 (C.A. D.C.), discussed in note 15, *supra*.

stated that it could not "believe that to achieve this end all administrative action affecting deportation, regardless of the official responsible for it, is reviewable exclusively by this court" (A. 25a).[25] The unexpressed, but implicit, basis for the lower court's assumption is that the courts of appeals should not be bothered with, and perhaps would be overburdened by, review of subsequent administrative determinations. While we explore this hypothesis at a later point (*infra*, pp. 36–37), it should be noted that the obvious result of adopting a restrictive approach to review under Section 106(a) is that such issues will be litigated in the district courts, with the added step of ensuing appeals to the courts of appeals where delay is the objective. In short, it is doubtful that the bother and burden will be significantly lessened by reading the statute narrowly.

In concluding its opinion, the court below noted that it concurred in the Second Circuit's view "that new legislation is necessary to rescue the courts and lawyers from these fruitless jurisdictional disputes" (A. 25a). We submit, however, that new legislation is not needed if we are correct in our interpretation of Section 106(a). Moreover, the nine-year period consumed in enacting the present statute, despite Representative Walter's vigorous sponsorship, indicates that new legislation may not come easily or promptly. Needless to add, there are no "fruitless jurisdictional

[25] Pursuing the same thought the court below thought it "absurd" to suppose that denials of stays of deportation could be reviewable in courts of appeals where there is no administrative appeal from such denials (A. 25a). But the reasons for disallowance of an administrative appeal from such determinations is precisely to discourage dilatory tactics (see 8 C.F.R. 243.4).

disputes" in the Seventh, Sixth, and Fourth Circuits, which have adopted a broad construction of Section 106(a).

B. *Second Circuit.* As in the *Foti* litigation (see 308 F. 2d 779), the Second Circuit has taken the lead in adopting a restrictive reading of the statute. In *Mui* v. *Esperdy,* 371 F. 2d 772 (C.A. 2), certiorari denied, 386 U.S. 1017, an action challenging the denial of stays of deportation was brought in the district court by a group of deserting Chinese crewmen. The substantive issue was the same as that presented to the court below, and the district court dismissed the complaint on the merits. On appeal the court of appeals found that the district court had jurisdiction and affirmed the dismissal on the merits. In holding Section 106(a) inapplicable, it reasoned that that the orders denying stays of deportation "were not made pursuant to administrative proceedings under § 242(b)" (371 F. 2d at 776). Such a rigid assessment of the statute, as we have shown (*supra,* pp. 22–25), is not compelled by the text and runs counter to the manifest purpose depicted in the legislative history.

In addition, the Second Circuit found *Giova* inapplicable because in *Mui* no motion to reopen the proceedings was involved. Apparently, the Second Circuit would give controlling weight to the label placed on an application rather than focus on the role of the resulting administrative determination in the overall deportation process. Under the Second Circuit's view, by simply designating an application as one for a stay of deportation instead of for a reopening of the

proceedings, the deportee could avoid the jurisdictional requirements of Section 106(a).

While conceding that a broad interpretation would avoid a "sterile jurisdictional controversy," the Second Circuit did not feel itself justified in "recasting" the statute, or "in going so far beyond the words that Congress used * * * to give the courts of appeals exclusive jurisdiction over all orders made by immigration officers which might affect the deportation of aliens" (371 F. 2d at 777). Like the Third Circuit, it suggested "the desirability of Congress' clarifying this needlessly murky piece of legislation and rescuing lawyers and judges from the fruitless jurisdictional disputes that will continue to plague them until it does" (*id.* at 778, n. 3). We have already responded to the latter suggestion (see *supra,* p. 34). However, the Second Circuit's apparent objection to review in courts of appeals of "all orders * * * which might affect the deportation of aliens" merits further comment. In the first place, that view overlooks Representative Walter's declaration that Section 106(a) "would apply to any other issue brought up in deportation proceedings" (104 Cong. Rec. 12728), as well as the explicit listing in the House chart (see Appendix B) of "Stay of Deportation" as an integral part of the deportation process. Implicit in the Second Circuit's comment is an apparent apprehension that review of ancillary applications would overburden the courts of appeals. A similar concern was expressed by the Second Circuit in *Foti* (308 F. 2d 779, 788–

789), but was found unpersuasive by this Court (375 U.S. at 230). As noted earlier (*infra*, pp. 18–19), many cases will probably reach the courts of appeals in any event, after the delay resulting from initial consideration in the district courts. Moreover, the feared burden of numerous petitions for review has not developed in the Second Circuit after the *Foti* decision. And we are unaware of any excessive burden of petitions for review in the courts which might argue against the broad interpretation of the statute here urged. There has been some increase in such petitions for review in the Seventh Circuit,[26] but in the Sixth and Fourth Circuits the volume of such petitions has been quite insignificant. In short, the Second Circuit's concern with a predicted flood of Section 106(a) review petitions does not appear to be borne out by experience.

C. *Ninth Circuit.* We find the best statement in support of a restrictive reading of Section 106(a) in *Yamada* v. *Immigration & Naturalization Service*, 384 F. 2d 214 (C.A. 9). That case, however, is not precisely in point since it did not involve the denial of a stay of deportation but rather challenged the denial, subsequent to the entry of a deportation order, of a visa petition which would have enabled the deportee to apply for permanent resident status. In

[26] On February 29, 1968, 31 petitions for review under Section 106(a) were pending in the Seventh Circuit. In 23 of these the briefs of the parties had not yet been filed, six cases were ready for argument, and two were under advisement. The Seventh Circuit has been able to deal expeditiously with the petitions for review presented to it.

finding that it lacked jurisdiction, the court stated (384 F. 2d at 216):

> If we were satisfied that Congress intended the result reached by the Court of Appeals for the Seventh Circuit, we would agree that the language of section 106(a) does not necessarily bar it. The grant of jurisdiction to review final deportation orders made in section 242(b) proceedings could reasonably be taken to imply power to review other orders directly affecting the execution or suspension of the orders specifically mentioned.

However, the Ninth Circuit found, on the basis of observations in this Court's *Foti* opinion and the colloquy on the floor of the House of Representatives (see *supra*, pp. 12–13) that there was a deliberate congressional design to limit Section 106(a) review to determinations made in the course of the deportation proceedings. As we have previously indicated, we read the *Foti* opinion as addressed to the question before the Court and not as foreclosing the issue now under consideration (see *supra*, pp. 14–16). And the House colloquy, in our view, is not inconsistent with the position urged here, but supports a broad reading of the statute. Moreover, the overall legislative history does not, as we read it, support such a limited scope. Indeed, a more expansive design is plainly shown by the House chart describing the deportation process (see Appendix B), which indicates that stays of deportation and matters relating to the execution of the deportation order were regarded by Congress as within the purview of Section 106(a).

Further exploring the congressional purpose, the Ninth Circuit found that "Congress was also con-

cerned with the delay which resulted from multiple court proceedings" (384 F. 2d at 218). It stated "that Congress visualized a single administrative proceeding in which all questions relating to an alien's deportation would be raised and resolved, followed by a single * * * review both of the ultimate question of deportation and of all of the subsidiary questions upon which it might depend" (*ibid.*). Accordingly, it suggested that all difficulties could be resolved, through resort to the rulemaking process, by including all ancillary determinations in the deportation proceeding itself, and declared that this objective would not be achieved by a broad reading of Section 106(a), since that would still leave open the possibility of consecutive reviews (*ibid.*).

Despite its superficial plausibility and appeal, there are serious difficulties with the Ninth Circuit's proposed solution—amendment of administrative regulations in an effort to channel all determinations into one proceeding. Congress in enacting Section 106(a) was indeed concerned with multiple judicial review, but it nowhere stated that it was restricting each litigant to one proceeding. On the contrary, every significant legislative expression, including Section 106(a) itself and the committee report quoted by the Ninth Circuit, merely declared that the statute prescribed a single, exclusive "form" or "method" of review (see *supra*, p. 12). This Court pointed out in *Foti* that the "key feature" of the Congressional plan was to eliminate district court litigation (375 U.S. at 225).[27] And

[27] Moreover, in discussing the problem of dilatory litigation, Representative Celler, in opposing the bill, stated that "[t]here is nothing to prevent them from going to the court once or

Section 106(c), of the statute (8 U.S.C. 1105a(c)) itself recognizes that there will be multiple litigation in some cases; it bars a new petition for judicial review "unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order."

The Ninth Circuit's aim to foster a single review is certainly desirable. We join the court's suggestion (384 F. 2d at 218, n. 7), later implemented in *Waziri* v. *Immigration & Naturalization Service,* C.A. 9, No. 21,129, decided January 18, 1968, that antecedent determinations should be included in Section 106(a) review (see *supra,* p. 30). And we believe multiplicity of review can be reduced by regulations providing for consolidation of some ancillary determinations in the hearing process (see 8 C.F.R. 242.17, and *Foti,* 375 U.S. at 230, n. 16). But these are administrative expedients which promote expedited consideration, albeit they entail some awkwardness by requiring conditional applications for relief before deportability is determined. They do not change the total character of the deportation process which, as *Foti* and *Giova* indicate, is not limited to determinations of deportability.

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twice even now under this bill.'" Representative Walter did not dispute this statement, and merely observed that, "[i]n view of the fact that nobody is going to be deprived of judicial review under this bill, it seems to me that opposition to it comes from those people who would perpetuate the abuses that have manifested themselves throughout the years" (House Hearing, *supra* note 7, at 5).

As this Court recognized in *Foti* (375 U.S. at 222), the deportation process has been enlarged and complicated by the many discretionary remedies which have been provided since 1940. Indeed, many of the most important changes have been made since 1957 (see 1 Gordon and Rosenfield, *Immigration Law and Procedure* (Rev. Ed.), Secs. 1.1, 1.4b, 1.4c. It has been feasible to provide for the consideration of some of these matters in the basic deportation proceeding. In other instances, it has been deemed more appropriate or expedient to consider them separately. It is difficult to conceive how their relationship to the basic deportation order is changed by the prescribed timing of their administrative consideration.

Moreover, as in the instant case, an application to reopen the proceedings or for stay of deportation frequently has been generated by benefits afforded by new legislation—here the major revision of 1965. As in many other cases, the motions to reopen or for stay of deportation were made here by deserting Chinese crewmen who claimed they were entitled to refugee benefits under Section 203(a)(7) of the Act (8 U.S.C. (Supp. II) 1153(a)(7)). Hundreds of deserting Chinese crewmen have sought similar relief. In many instances the statutory benefits they sought became available after the entry of the basic deportation orders, and thus could not in any event have been sought as an incident of the deportation proceedings themselves.

We believe the Ninth Circuit is mistaken in supposing that complete administrative consolidation is either required by the statute or can successfully be achieved. Practical considerations and the ordinary sequence of events prevent the consideration of all matters at the

same time by the same official. There are obstacles which inhere in the mechanics of the deportation process itself. Some determinations and procedures, as we have noted, necessarily occur after entry of the basic order. These include, of course, efforts to execute the order: It is necessary, for example, to communicate with foreign governments to ascertain whether they will accept the deportee and with transportation lines to arrange passage. It is also necessary to give the deportee time to arrange his affairs and to cope with emergent situations. These and similar matters usually can best be handled by district directors rather than special inquiry officers (see 8 C.F.R. 243.2, 243.3, 243.6, 243.7). That is why the regulations generally require that applications for stays of deportation be presented to the district directors who make the arrangements for executing the order (8 C.F.R. 243.4). Moreover, since special inquiry officers are not regularly stationed in many district offices, it is often more convenient and expeditious for applications to stay deportation to be presented to the district director.

Similarly, a later application may be presented because of changed circumstances, *e.g.*, the alien may be in a position to claim benefits because he marries an American citizen, has a child born in the United States or comes within the terms of a new law. Indeed, many of the questions regarding the applicability of Section 106(a) have resulted from subsequent determinations generated by such changed circumstances. The Ninth Circuit's hypothesis would not preclude new litigation when relief is denied in such situations

but would channel it into the district courts, a consequence Section 106(a) sought to avoid.

Multiple litigation does indeed present a continuing problem for which no completely satisfactory solution has yet been found. The problem is compounded, of course, by the automatic stay of deportation which is triggered by the filing of each petition for review, under Section 106(a)(3) of the statute (8 U.S.C. 1105a(a)(3)). Such stays have doubtless been utilized by those interested primarily in dilatory litigation. We urge, however, that the best way to deal with such litigation is the one projected by Section 106(a)—adherence to the single form of review in the court of appeals. The courts of appeals can, and do, cope with dilatory litigation—by enforcing the mandate of Section 106(c) prohibiting renewed review without a showing of changed circumstances, by granting motions to dissolve the statutory stay of deportation under Section 106(a)(3) and by expediting the consideration and disposition of meritless petitions for review.

By and large, the chief source of delay has been the "fruitless jurisdictional disputes" engendered by a restrictive interpretation of Section 106(a). That needless controversy will be terminated if this Court should approve the approach here urged—a broad reading of Section 106(a) adumbrated by the *Foti* and *Giova* decisions and already adopted by three circuits—and prevent any further, wasteful controversy over the forum in which review should be sought. It is the approach, we therefore submit, which this

Court, confirming the view of the Seventh, Sixth and Fourth Circuits, should here adopt.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the cause be remanded to that court with directions to entertain the petition for review.

Respectfully submitted.

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APPENDIX A

STATUTES AND REGULATIONS INVOLVED

I. STATUTES

Sec. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.) [28] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall

[28] By Section 4(e) of the Act of Sept. 6, 1966, (P.L. 89-554, 80 Stat. 378, 621), the 1950 Act referred to (the Hobbs Act) was recodified as 28 U.S.C. 2341-2352.

be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

(6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e)

of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28, United States Code. Any such alien shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

(7) nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 242 of this Act. Nothing contained in this section shall be con-

strued to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 242 of this Act at any time after the issuance of a deportation order;

(8) it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy

provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

* * * * * *

Sec. 242. (b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceedings, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special

inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are de-

portable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States the expense of such removal may be paid from the appropriation for the enforcement of this Act.

* * * * *

Sec. 243. (a) The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be

directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to ~~any~~ country which is willing to accept such alien into its territory.

* * * * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for

such period of time as he deems to be necessary for such reason.

II. REGULATIONS

Title 8 of the Code of Federal Regulations provides in pertinent part:

§ 242.8 *Special Inquiry Officers*—(a) *Authority.* In any proceeding conducted under this part the special inquiry officer shall have the authority to determine deportability and to make decisions, including orders of deportation as provided by section 242(b) of the Act; to reinstate orders of deportation as provided by section 242(f) of the Act; to determine applications under sections 244, 245, and 249 of the Act; to determine the country to which an alien's deportation will be directed in accordance with section 243(a) of the Act; to order temporary withholding of deportation pursuant to section 243(h) of the Act, and to take any other action consistent with applicable provisions of law and regulation as may be appropriate to the disposition of the case. A special inquiry officer shall have authority to certify his decision in any case to the Board of Immigration Appeals when it involves an unusually complex or novel question of law or fact.[29] Nothing contained in this part shall be construed to diminish the authority conferred on special inquiry officers by the Act.

* * * * *

§ 242.18(c) *Order of the specal inquiry officer.* The order of the special inquiry officer shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When deportation is ordered, the special inquiry officer shall specify the country, or countries in the alternate, to which respondent's deportation

[29]As amended by 32 F.R. 9616 (July 4, 1967).

shall be directed. The special inquiry officer is authorized to issue orders in the alternative or in combination as he may deem necessary.

* * * * *

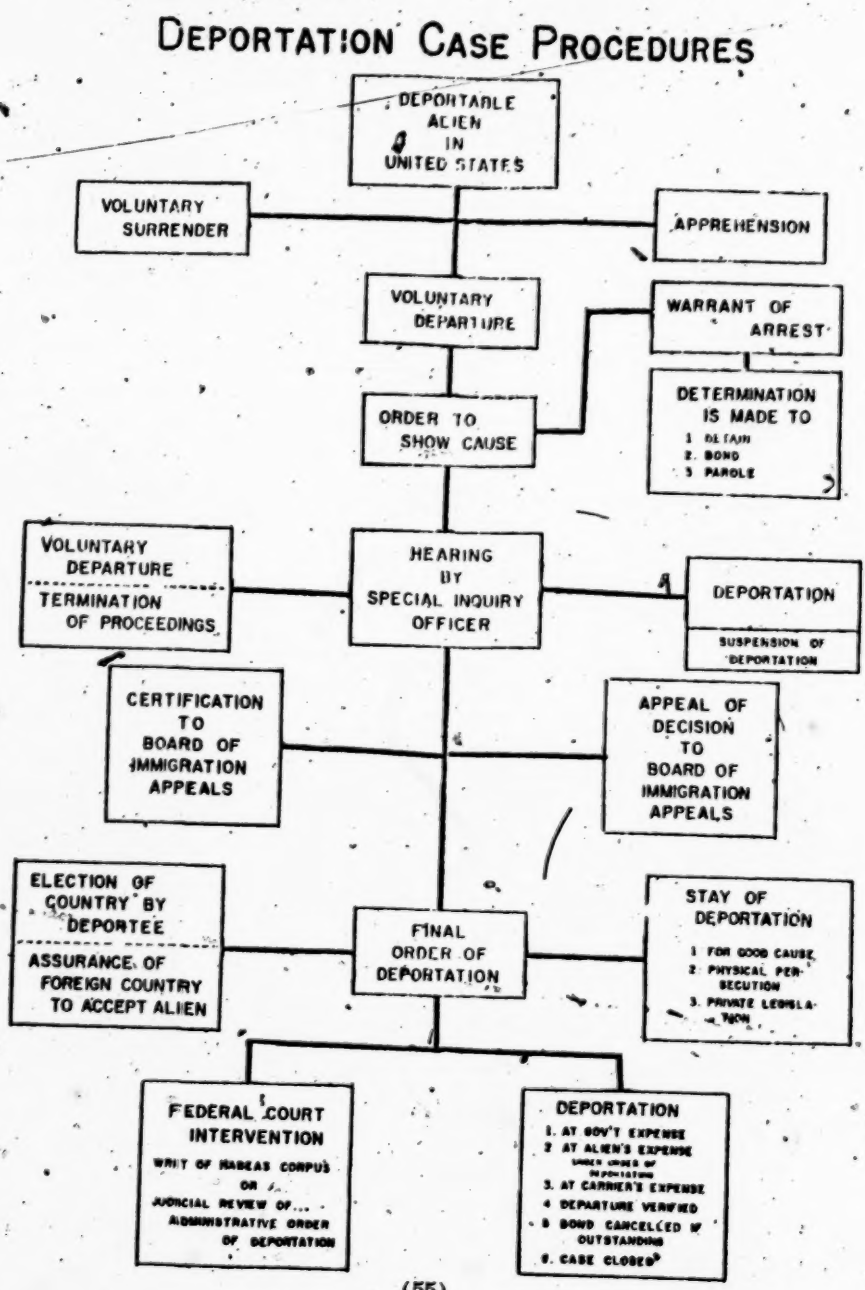
§ 243.2 *Warrant of deportation.* A warrant of deportation based upon the final administrative order of deportation in the alien's case shall be issued by a district director. The district director shall exercise the authority contained in section 243 of the Act to determine at whose expense the alien shall be deported and whether his mental or physical condition requires personal care and attendance en route to his destination.

* * * * *

§ 243.4 *Stay of deportation.* Any request by an alien under a final administrative order of deportation for a stay of deportation, except a request for withholding of deportation pursuant to section 243(h) of the Act, shall be filed on Form I–246 with the district director having jurisdiction over the place where the alien is at the time of filing. The district director, in his discretion, may grant a stay of deportation for such time and under such conditions as he may deem appropriate. Written notice of the disposition of the alien's request shall be served upon him, but neither the making of the request nor the failure to receive notice of the decision thereon shall relieve or excuse the alien from presenting himself for deportation at the time and place designated for his deportation. Denial by the district director of a request for a stay is not appealable but such denial shall not preclude the Board from granting a stay in connection with a motion to reopen or a motion to reconsider as provided in Part 3 of this chapter.

APPENDIX B

Chart outlining administrative procedures in deportation cases, as reproduced in H. Rep. No. 423, 86th Cong., 1st sess., p. 20, and H. Rep. No. 565, 87th Cong., 1st sess., p. 27:



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